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Nos. 83-812 and 83-929

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, *et al.*,
Appellants

v.

ISHMAEL JAFFREE, *et al.*,
Appellees

and

DOUGLAS T. SMITH, *et al.*,
Appellants

v.

ISHMAEL JAFFREE, *et al.*,
Appellees

On Appeals from the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE CENTER FOR JUDICIAL STUDIES IN SUPPORT OF APPELLANTS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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INTEREST OF THE AMICUS CURIAE

The Center for Judicial Studies, Rt. 2, Box 93, Cumberland, VA 23040 (804) 492-4922 is a tax-exempt, public policy institution founded in 1982 for the purpose of promoting judicial and legal reform. It is the only educational and legal organization in the United States that focuses exclusively on the problem of judicial activism and seeks to confine the powers of the federal judiciary within the powers envisioned for that judiciary by the

framers of the Constitution and the amendments thereto, including especially the Fourteenth Amendment. The Director of the Center for Judicial Studies is Dr. James McClellan.

The Appeal in this case involves an application of rulings by the United States Supreme Court which interpret the Fourteenth Amendment so as to apply the provisions of the Bill of Rights directly against the States. The Center for Judicial Studies contends that those holdings of the Supreme Court are contrary to the intent of the Fourteenth Amendment and that they have caused an imbalance in federal-state relations which ought to be corrected. This appeal presents an unusual opportunity for a serious discussion of these issues which constitute the main interest of the Center for Judicial Studies.

SUMMARY OF ARGUMENT

1. The rulings of the Supreme Court of the United States on the subject hold that officially sanctioned, voluntary public school prayer is a violation of the Establishment Clause of the First Amendment, as that clause has been held to apply to the States through the Fourteenth Amendment. Those rulings, however, are erroneous because the Fourteenth Amendment was not intended to apply any provisions of the Bill of Rights against the States.

2. Even if the Fourteenth Amendment were intended to apply some provisions of the Bill of Rights against the States, it was not intended so to apply the Establishment Clause. The rulings of the Supreme Court of the United States which interpret the Fourteenth Amendment so as to apply the Establishment Clause and other provisions of the Bill of Rights to the States are based on an erroneous interpretation of the history and intent of the Fourteenth Amendment; those rulings should be reexamined and rejected on the ground that they are unconstitutional.

3. Even if the Supreme Court were correct in its interpretation that the Establishment Clause was made applicable to the states by the Fourteenth Amendment, officially sanctioned, voluntary public school prayer, including an officially sanctioned period of silence for meditation or voluntary prayer, is still not in violation of the Constitution of the United States. This is so because the Establishment Clause was not intended to prevent any government, whether national or State, from encouraging religion and morality through sanctioning voluntary prayer in public schools. The rulings of the Supreme Court which interpret the Establishment Clause to preclude such a law or practice are based on an erroneous interpretation of the history and intent of the Establishment Clause. In light of newly published research and newly discovered historical material, those rulings should be reexamined and rejected.

4. Officially sanctioned, voluntary public school prayer is an exercise of the power reserved by the States to encourage religion and morality. Since the exercise of that power is not forbidden by any provision of the Constitution of the United States, including the amendments thereto, such prayer is not in violation of that constitution.

ARGUMENT

I. The Fourteenth Amendment Was Not Intended to Apply any of the Provisions of the Bill of Rights Against the States.

A. *General Considerations.*

In the 1963 school prayer case, the Supreme Court stated that:

> ". . . this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in *Cantwell v.*

> *Connecticut*, 310 U.S. 296, 303 . . . This Court, through Mr. Justice Roberts, said:
>
> > "The fundamental concept or liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . ."
>
> In a series of cases since Cantwell the Court has repeatedly reaffirmed that doctrine, and we do so now. *Abington School District v. Schempp*, 374 U.S. 203, 215 (1963)

An examination of the legislative history and intent of the Fourteenth Amendment, however, demonstrates that the Court's interpretation of that amendment is incorrect. In a matter of such importance, it is appropriate to reverse an erroneous interpretation no matter for how long that error has been accepted by the Court. The legislative history of the Fourteenth Amendment demonstrates that the application by the Supreme Court of the Bill of Rights to the States fits Justice Holmes' description, in another context, of "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). In his definitive analysis of that legislative history, Charles Fairman exhaustively analyzes the "mountain of evidence" from the Congressional debates, the State ratifying proceedings and other original sources in support of his conclusion that the framers and ratifiers of the Fourteenth Amendment did not intend to make the Bill of Rights applicable against the States. Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?, 2 Stan. L.

Rev. 5, 134 (1949) He contrasts this "mountain of evidence" with "the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII." Ibid. The following passage from Fairman effectively summarizes his conclusion:

> As one looks up from this protracted inquiry, certain broad reflections seem controlling. If Senator Howard's statement about Amendments I to VIII had really been accepted at the time, surely one would find it caught up and repeated in contemporary discussion. "Section I incorporates the Bill of Rights"—an intricate subject would have been compressed into a capsule. So pat a phrase would have been passed about. The Democratic opposition, if they had understood that any such object was in view, would have sought to turn it to their advantage in states whose practice would be disturbed. And yet one does not find the thought expressed—neither in newspaper editorials or campaign speeches so far as they have been examined, nor in the messages of governors. Lawyers would have urged the contention in the courts, and if need be carried their appeals to the Supreme Court. But this simply did not occur.
>
> The freedom that the states traditionally have exercised to develop their own systems for administering justice, repels any thought that the federal provisions on grand jury, criminal jury, and civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified. The electoral campaign of 1866 was fought over the proposed Amendment but the debates never took the turn of suggesting that ratification would involve major change in the administration of justice in the Northern States. Recall how the legislatures in many Northern States, obedient to the autumn mandate, had trooped to ratify the Amendment—even suspending rules, refusing to refer to committee, cutting off debate; surely all this haste was not to make Amendments V, VI, and VII the Constitution's rule for every state. As one pon-

> ders the matter, this consideration seems far more substantial than a few words uttered by Bingham and Howard in the debates of 1866—especially since we have found that their conduct denied their words. *Ibid*, at 137-38

According to Alexander Bickel, Fairman "conclusively disproved [Justice Hugo Black's contention that the Fourteenth Amendment incorporated the Bill of Rights], at least, such is the weight of opinion among disinterested observers." Bickel, The Least Dangerous Branch (1962), 102. And Raoul Berger more recently notes that "my study of the debates and the history of the period leads me fully to concur with Fairman. . . ." Berger, Government by Judiciary (1977), 156, n. 95. As Berger states, the effect of the Supreme Court's incorporation of the Bill of Rights into the Fourteenth Amendment is "to broaden the Fourteenth Amendment and curtail States' Rights beyond the wildest conceptions of the framers and ratifiers." Berger, Government by Judiciary (1977), 156, n. 95. "[E]ven activists," notes Berger, "now concur that the Framers did not intend such incorporation." Raoul Berger, Death Penalties: The Supreme Court's Obstacle Course (1982), 15, citing Michael Perry, Interpretivism, Freedom of Expression and Equal Protection, 42 Ohio St. L. J. 261 (1981)

Professor Stanley Morrison's analysis of the judicial interpretations of the Fourteenth Amendment supports the Fairman conclusion. He concludes that the effort "to read the Bill of Rights into the Fourteenth Amendment amounts simply to an effort to put into the Constitution what the framers failed to put there. No matter how desirable the results might be, it is of the essence of our system that the judges must stay within the bounds of their constitutional power. Nothing is more fundamental —even the Bill of Rights. To depart from this fundamental is, in Mr. Justice Black's own words, "to frustrate the great design of a written Constitution." Morrison, Does the Fourteenth Amendment Incorporate the

Bill of Rights?—The Judicial Interpretation, 2 Stan. L. Rev. 140, 173 (1949). Nor can it be soundly argued that the Fourteenth Amendment applied some, but not all, of the provisions of the first eight amendments against the states. This selective incorporation theory, as Raoul Berger notes in his most recent book, "contemplates piecemeal incorporation by the Court, a course to which Justice Black vehemently objected, although in the end, as he himself noted, 'the selective incorporation process' has 'already worked to make most of the Bill of Rights' protections applicable to the States.' It represented, in the words of Justice White, 'a new approach,' departing from the Court's long course and not purporting to rest on historical warrant. Some articles of the Bill of Rights, Justice Cardozo had explained, were 'brought within the Fourteenth Amendment by a process of absorption,' a process that 'had its source in the belief [whose?] that neither liberty nor justice would exist if they were sacrificed.' The 'specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, became valid as against the States.' Not the faintest trace of 'ordered liberty' is to be 'found' in the history of the Fourteenth; the 'absorption' manifestly is a judicial construct. In what remains the most searching study of 'selective incorporation', Louis Henkin wrote, 'Selective incorporation funds no support in the language of the amendment, or in the history of its adoption,' and it is truly more difficult to justify than Justice Black's position that the Bill of Rights was wholly incorporated." Raoul Berger, Death Penalties: the Supreme Courts' Obstacle Course (1982), 15-16, quoting from Louis Henkin, 'Selective Incorporation' in the Fourteenth Amendment, 73 Yale L. J. 74, 77 (1963)

It is not the purpose of this brief to review in detail the legislative history and subsequent understanding of the Fourteenth Amendment. A few observations, how-

ever, are appropriate with respect to certain aspects of that history and understanding.

B. *The Congressional Debates on the Fourteenth Amendment.*

Those who would apply the Bill of Rights against the States by incorporating the first eight amendments into the word "liberty" in the due process clause of the Fourteenth Amendment, place primary reliance, with respect to the Congressional debates, on statements by two leading figures, Representative John A. Bingham of Ohio and Senator Jacob M. Howard of Michigan. *Adamson v. California*, 332 U.S. 46, 68-123 (1947) (dissenting opinion of Justice Black); Horace Flack, The Adoption of the Fourteenth Amendment (1908), 81, 87. However, as Professor Fairman has demonstrated in his analysis of Bingham's statements in the House, Bingham was confused as to the allocation of power between Congress and the states that already existed in the Constitution. This was dramatically illustrated when he addressed the House in introducing an early version of what became the Fourteenth Amendment. That version would have given Congress power to secure to all citizens in each state all privileges and immunities of citizens in the several States and to secure to all persons in the States equal protection in the rights to life, liberty, and property. Bingham declared, incorrectly, that every provision of the proposed amendment was already in the Constitution excepting only the enforcement power his amendment would give to Congress. *Cong. Globe*, 39th Cong., 1st Sess. 813 (1865-66) But there was, of course, no provision then existing in the Constitution which obliged the States to secure "equal protection in the rights to life, liberty and property." "A careful reader will have remarked," observes Professor Fairman, that Bingham "held a singular opinion on the constitutional problem. The states had all along been bound to accord the 'privileges and immunities' of Article IV, Section 2, but Congress had no power

to compel obedience. The states had all along been bound to protect the rights of life, liberty, and property: the Fifth Amendment recognized them and forbade the United States Government to infringe them; but again, Congress had not been given power to compel the states to observe these rights. If a state officer or legislator participated in making or enforcing a state law which, had such action been in the federal system would have amounted to a denial of the rights of life, liberty, or property, that state officer or legislator thereby violated his oath to observe the Constitution of the United States! But he did it with impunity, because the Fathers had given Congress no power to interfere. This is a novel, and one may think a befuddled, construction of the Constitution." Fairman, at 25-26.

As Fairman and others have shown from the record of Congressional debates, Bingham's "befuddled" remarks lending support to the theory that the Bill of Rights should be applied to the States were not only confused and self-contradictory, but also they failed to reflect the clearly predominant thinking of the House of Representatives. See Fairman at 24-37; Berger at 140-47.

Senator Howard is hardly more reliable as a support for the incorporation thesis. On May 23, 1866, Senator Howard acted as spokesman for the joint committee in presenting the resolution which ultimately became the Fourteenth Amendment. *Cong. Globe*, 39th Cong., 1st Sess. 2765 (1865-66). Referring to the privileges and immunities protected by Article IV, Sec. 2, of the Constitution, Howard said, "To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their entire extent and precise nature—to these should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution. . . . The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."

This isolated statement, however, must be discounted by the facts that:

(1) Senator Howard failed to distinguish between due process of law and the concept of privileges and immunities;

(2) he represented a minority, radical view on the joint committee and he presented the resolution for the committee only because Senator Fessenden, the chairman, was ill;

(3) Senator Howard's position was specifically contradicted by other Senators on the floor; and

(4) there is no evidence that Senator Howard's view was accepted by either the House or the Senate. Fairman, at 57-68; Berger, Government by Judiciary, at 147-51.

C. *State Legislative Debates on the Fourteenth Amendment.*

If the Fourteenth Amendment imposed upon the States, in 1868, the duty of complying with the protections of the Bill of Rights, it would have immediately required a change in the laws of any state, for example, that allowed an accused to be charged with an "infamous crime" upon information rather than upon "presentment or indictment of a Grand Jury" (Fifth Amendment); that permitted some criminal prosecutions to be tried without a full twelve-man jury (Sixth Amendment); that denied "the right of trial by jury" in any common law suit "where the value in controversy shall exceed twenty dollars" (Seventh Amendment). In *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), Chief Justice John Marshall, writing for a unanimous Court, reaffirmed that the Bill of Rights did not apply to the States. If the Fourteenth Amendment changed that, it would mean, for example, that the States were forever bound to the grand jury system unless they could re-amend the Constitution of the United States. Although the "legislatures, almost without exception, kept no record of debates, but only a

journal of motions and votes" Fairman at 82, Professor Fairman examined those journals and related background material and found no significant evidence of support for the application of the Bill of Rights to the States by the Fourteenth Amendment. Fairman at 81-132. When, for example, an Illinois state constitutional convention met in 1869-70, one of the hotly debated proposals was one to abolish the grand jury. Yet the supporters of the grand jury "never so much as suggested that the Fourteenth Amendment incorporated the federal Bill of Rights and thus had fastened the grand jury upon the several states." Fairman at 99.

D. *The Readmission of Seceded States.*

Space limitations prevent more than a passing comment upon the action of Congress in 1868 readmitting six Confederate states to the Union. Representative Bingham and Senator Howard strongly urged the enactment of the resolution readmitting the states. Bingham stipulated one condition: "that not one of the six states named in it shall come to political power save upon the condition that its Legislature shall in due form ratify the fourteenth article of amendment." *Cong. Globe*, 40th Cong., 2d Sess., 3094. Of the six states, the constitutions of Florida, South Carolina, Louisiana and Georgia did not fulfill the requirements of the Fifth and Sixth Amendments with respect to criminal prosecutions. Yet "no member of Congress had evinced the slightest interest in comparing the respective bills of rights with Amendments I to VIII—though as we have seen some marked disparities were to be observed." Fairman at 130. And Bingham himself declared: "The constitutions of these several States, in accordance with the spirit and letter of the Constitution of the United States as it stands amended by the act of the American people, secure equal political and civil rights and equal privileges to all citizens of the United States, native born and naturalized. . . . ." *Cong. Globe*, 40th Cong., 2d Sess. 2462 (1867-68)

E. *Contemporaneous Judicial Decisions.*

Several cases, decided shortly after the adoption of the Fourteenth Amendment, confirm that it was not intended to apply the Bill of Rights against the states. For example, in December, 1868, five months after the promulgation of the Fourteenth Amendment, the Supreme Judicial Court of New Hampshire quoted Story's Commentaries on the Constitution in support of its conclusion that, by the First Amendment, "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the state constitutions." *Hale v. Everett*, 53 N.H. 1, 124 (1868). In *Twitchell v. Pa.*, 7 Wall, 321 (1869), the Supreme Court of the United States, less than a year after the adoption of the Fourteenth Amendment, followed *Barron v. Baltimore*, 32 U.S. (7 Peters) 243 (1833), in holding that the fifth and sixth amendments do not apply to the states. To a similar effect, a year later, was the decision in *Justices of the Supreme Court of New York v. U.S. ex rel. Murray*, 76 U.S. (9 Wall.) 274, 278 (1870), in which the Supreme Court stated:

> "Another argument mainly relied upon . . . is that the first ten amendments proposed by Congress, and adopted by the States, are limitations upon the powers of the Federal government, and not upon the States; and we are referred to the cases of *Barron v. The Mayor and City Council of Baltimore* (7 Peters, 243); *Lessee of Livingston v. Moore and Others* (Ib. 551); *Twitchell v. The Commonwealth* (7 Wallace, 321), as authorities for the position. This is admitted, and it follows that the Seventh Amendment could not be invoked in a state court to prohibit it from reexamining, on a writ or error, facts that had been tried by a jury in the court below."

As Justice Frankfurter commented with respect to these cases, "the Court accepted as settled that the Seventh Amendment did not apply to the States. Neither

case intimates that anyone even thought of proposing that these amendments had been newly brought to bear on the States by the Fourteenth. Yet the Fourteenth's formulation and adoption had been a subject of great interest, especially to lawyers and judges, only months prior to the decision of these cases. The significance of this contemporaneous understanding need not be labored." Frankfurter, Memorandum on "Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, 78 Harv. L. Rev. 746, 750 (1965).

"On every question of construction," wrote Thomas Jefferson, "carry ourselves back to the time when the Constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed." Thomas Jefferson letter to William Johnson in 1823, in Ford, The Writings of Thomas Jefferson, X, 231 (1899). From the foregoing analysis, it is as clear as anything could possibly be in constitutional interpretation that the Fourteenth Amendment was not intended to apply the Bill of Rights against the States.

II. Even if the Fourteenth Amendment Were Intended to Apply Some Provisions of the Bill of Rights Against the States, It Was Not Intended so to Apply the Establishment Clause of the First Amendment.

A. *The Nature of the Establishment Clause.*

The Supreme Court has interpreted the word "liberty" in the due process clause to include the First Amendment's protection against any "law respecting an establishment of religion." *Abington School District v. Schempp*, 374 U.S. 203 (1963). The Establishment Clause, however, differs from the other provisions of the first eight amendments of the Bill of Rights. Those other provisions, e.g., against unreasonable searches and seizures, self-incrimination, etc., are protections of specific personal liberties against infringement by government. In the initial understanding, they were protections only

against infringement by the government of the United States. Even if it were true that the Fourteenth Amendment was intended to protect those liberties against infringement by the states, it would be unsound to draw that conclusion with respect to the Establishment Clause. For, as will be noted in Part III of this brief, the Establishment Clause was not intended to prevent government from encouraging religion and morality by acknowledging God. Rather, it was primarily intended to exclude the federal government entirely from legislating in any direction on the subject of establishments of religion and to ensure that that subject would be exclusively and unrestrictedly within the competence of the state governments. As Edward S. Corwin described the intent of the Establishment Clause: "That is, Congress should not prescribe a national faith, a possibility which those states with establishments of their own—Massachusetts, New Hampshire, Connecticut, Maryland, and South Carolina —probably regarded with fully as much concern as those which had gotten rid of their establishments. . . . In short, the principal importance of the Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion, rather than in its bearing on the question of the Separation of Church and State." Edward S. Corwin, The Supreme Court As National School Board, in A Constitution of Powers in a Secular State (1951), 102, 106.

It is unsound to equate this assurance of state jurisdiction over the matter of religious establishments with a protection of "liberty." For even if an establishment of religion were regarded as equivalent to a denial of "liberty," the Clause does not at all protect against establishments on the state level. "The Constitution," said the Supreme Court in 1845, "makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. Nor is there any inhibition imposed by the constitution in this respect on the states." *Permoli v. First*

Municipality of New Orleans, 44 U.S. 588, 609 (1845); see also, *Hale v. Everett*, 53 N.H. 1, 124 (1868). As Corwin concludes, "the prohibition on the establishment of religion by Congress is not convertible into a similar prohibition on the States, under the authorization of the Fourteenth Amendment, unless the term "establishment of religion" be given an application which carries with it invasion of somebody's freedom of religion, that is, of "liberty." Corwin at 116. The Establishment Clause, in summary, was intended not as a protection of personal "liberty" but as a delineation of federal and state jurisdiction.

B. *The Blaine Amendment.*

Even if there were nothing else in the record, the history of the Blaine Amendment would establish conclusively that the Establishment Clause was not intended by the Fourteenth Amendment to be applied against the States. The last third of the nineteenth century saw heightened public interest in the role of religion in public education. This interest was reflected in the history of the Blaine Amendment. In 1875, President Ulysses S. Grant delivered an address to the Army of the Tennessee in which he cautioned against public support of sectarian schools and the intrusion into the public schools of "sectarian, pagan or atheistical dogmas." Anson Stokes, Church and State in the United States, II, 722 (1964). In his annual message to Congress that year, President Grant called for a Constitutional amendment along those lines. Stokes at 723. In accord with his request, the Blaine Amendment was introduced in the House of Representatives in 1875. 4 *Cong. Rec.*, 44th Cong., 205. As introduced in the House it read:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands

> devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations. *4 Cong. Rec.*, 44th Cong., IV, 205.

The Amendment passed the House of Representatives by a two-thirds majority. 4 *Cong. Rec.*, 44th Cong., 5189-92. It was rewritten by the Senate Judiciary Committee and, as debated in the Senate, it read as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District, or municipal corporation, shall be appropriated to or made or used for the support of any school, educational or other institution under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit, and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization, or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights or property already vested.
>
> Sec. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article. *Ibid.*, 5443

The Blaine Amendment was defeated in the Senate. But it was incorporated in the Republican Party's national platform of 1876 and, for a time, was a burning political issue. The impact of the issue, and the general

frame of the public mind during the last quarter of the nineteenth century and the first years of the twentieth, is indicated by the widespread incorporation of similar provisions by 29 states into their own contributions between 1877 and 1917. Carol Zollman, American Church Law (1933), 74-80. The Blaine Amendment itself was introduced in Congress twenty times between 1876 and 1929 but it never received the requisite two-thirds majorities and thus was never referred for ratification to the states. *Proposed Amendments to the Constitution*, H.R. Doc. No. 551 (7th Cong., 1st Sess.), 182; *see* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939 (1951)

"It scarcely needs to be mentioned that the basic presumption underlying the 1876 resolution was that the States were not forbidden by the Federal Constitution to establish churches, to infringe religious liberty, or to give public funds for religious purposes." F. William O'Brien, The States and "No Establishment": Proposed Amendments to the Constitution Since 1798, 4 Washburn L.J. 183, 187 (1965). The Congress which considered the Blaine Amendment in 1875 and 1876 included twenty-three members of the Thirty-ninth Congress, which had submitted the Fourteenth Amendment to the States. See James McClellan, Joseph Story and the American Constitution (1971), at 154. "Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. Congressman Banks, a member of the Thirty-ninth Congress, observed: 'If the Constitution is amended so as to secure the object embraced in the principal part of this proposed amendment, it prohibits the States from exercising a power they now exercise.' Senator Frelinghuysen of New Jersey urged the passage of the 'House article,' which 'prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise.' Senator Stevenson, in opposing the proposed amendment, referred to Thomas Jefferson: 'Friend as he [Jefferson]

was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a Government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion.' Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Eaton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First." F. William O'Brien, Justice Reed and the First Amendment (1958), 116-17.

Representative Blaine himself, who had taken an active part in the debates in the 39th Congress on the Fourteenth Amendment, confirmed beyond any doubt the contemporary understanding that the Fourteenth Amendment did not apply the Establishment Clause to the States. In an "open" letter written by Blaine to a political figure in Ohio, which letter was published in the New York Times two weeks before he introduced his amendment in the House, Blaine said:

> The Public School agitation in your late campaign is liable to break out elsewhere. . . . [T]he only settlement that can be final is the complete victory for non-sectarian schools. . . . The First Amendment of the Constitution, the joint product of Jefferson and Madison, proposed in 1789, declared that "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof." At that time when the powers of the federal government were untried and undeveloped, the fear was that Congress might be a source of danger to perfect religious liberty, and hence all power was taken from it. At the same time, states were left free to do as they pleased in regard to "an establishment of religion," for the Tenth Amendment, proposed by that eminent jurist, Theophilus Parsons, and adopted contemporaneously with the First, declared that "All powers not delegated to the national government . . . are reserved to the State. . . ."

> A majority of people in any state in this Union can, therefore, if they desire it, have an established church—under which the minority can be taxed for the erection of church edifices which they never enter and for the support of creeds which they do not believe. This power was actually exercised in many states long after the adoption of the federal constitution, and although there may be no danger of its revival in the future, the possibility of it should not be permitted. . . .
>
> And in curing this constitutional defect, all possibility of hurtful agitation on the school question shall also be ended. Just let the old Jefferson-Madison amendment be added to the inhibitory clause in Section 10, Article 1 of the federal Constitution, viz: "No State shall make any law respecting an establishment of religion, nor prohibiting the free exercise thereof; and no money raised by taxation for the support of the public schools, or derived from any public fund therefor, shall ever be under the control of any religious sect, nor shall any money so raised ever be divided between religious sects or denominations."
>
> This, you will observe, does not interfere with any state from having just such a school system as the citizens may prefer, subject to the one single and simple restriction that the schools shall not be made the arena for sectarian controversy or theological disputation. This, it seems to me, would be comprehensive and conclusive, and would be fair alike to Protestant and Catholic, to Jew and Gentile, leaving the religious conscience of every man free and unmolested. New York Times, Nov. 29, 1875, p. 2; O'Brien, 4 Washburn L.J. at 188.

From the history of the Blaine Amendment, one can only conclude that the Establishment Clause was not applied against the States by the Fourteenth Amendment. That history confirms the other and overwhelming indications that none of the provisions of the Bill of Rights was so applied.

III. Even if the Fourteenth Amendment Were Intended to Apply the Establishment Clause Against the States, Officially Sanctioned, Voluntary Public School Prayer, Including a Period of Silence for Meditation or Voluntary Prayer, Is Still Not Unconstitutional Because the Establishment Clause Was Not Intended to Prevent any Government from Encouraging Religion and Morality Through Such Prayer.

A. *The Supreme Court's View of the Purpose of the Establishment Clause.*

The currently effective criteria used by the Supreme Court to determine the constitutionality of a state or federal statute with respect to the Establishment Clause were spelled out in *Lemon v. Kurtzman*, 403 U.S. 602 at 612-13:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion." *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The basically controlling decisions of the Supreme Court on prayer in public schools are *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School District v. Schempp*, 374 U.S. 203 (1963). See also, *Marsh v. Chambers*, 103 S. Ct. 1330 (1983); *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984). The Court in *Engel* cited no cases in support of its decision. However, in *Schempp*, the Supreme Court relied in substantial part upon the history of the original intent of the Establishment Clause as expounded in *Everson v. Board of Education*, 330 U.S. 1 (1947):

> . . . this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over an-

other. Almost 20 years ago in *Everson, supra* (330 U.S. at 15), the Court said that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." And Mr. Justice Jackson, dissenting, agreed:

"There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Id.* 330 U.S. at 20.

Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

"The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* 330 U.S. at 31, 32.

The same conclusion has been firmly maintained ever since that time, *see Illinois ex rel. McCollum, supra* (333 U.S. at pp. 210, 211); *McGowan v. Maryland, supra* (366 U.S. at 442, 443); *Torcaso v. Watkins, supra* (367 U.S. at 492, 493, 495), and we reaffirm it now.

While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, *others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in*

cases of this Court, seem entirely untenable and of value only as academic exercises. Abington School District v. Schempp, 374 U.S. at 216-17 (Emphasis added).

B. *The Appropriateness of a Reexamination of the Supreme Court's View of the Purpose of the Establishment Clause.*

Although the Court, in this last quoted passage, dismissed further challenges to the Court's own interpretation of the history of the First Amendment as "entirely untenable and of value only as academic exercises," nevertheless, newly published historical research confirms that the Court's construction of the Establishment Clause involves, as Justice Holmes said on another subject," an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Significantly, the Supreme Court, in accord with the Holmes position, ruled in *Erie R. v. Tompkins*, U.S. 64 (1938), that the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) was abandoned because, as Justice Brandeis wrote in the opinion of the Court, "the unconstitutionality of the course pursued has now been made clear and compels us to do so." 304 U.S. at 77-78. Moreover, "in applying the doctrine this Court and the lower courts have invaded rights which are reserved by the Constitution to the several States" 304 U.S. at 80. The Court in *Erie* relied in part upon "the more recent research of a competent scholar" (Charles Warren, New Light on the History of the Federal Judiciary Act of 1789 (1923), 37 Harv. L. Rev. 49, 51-52, 81-88, 108; cited in *Erie R. v. Tompkins*, 304 U.S. at 72-73), who examined the history of the Judiciary Act of 1789 and "established that the construction given to it by the Court was erroneous." 304 U.S. at 72.

Just as an earlier Court, relying on advanced historical research, reexamined and disapproved the doctrine of

Swift v. Tyson, so the Supreme Court should now re-examine its Establishment Clause doctrine in the light of new historical research and newly discovered historical material that demonstrates that doctrine to be founded on clearly erroneous historical interpretations which can only be described, generously, as fictional.

C. *Newly Published Research and Newly Discovered Historical Material Demonstrates that the Supreme Court's View of the Purpose of the Establishment Clause is Clearly Erroneous.*

The literature on the historical meaning of the Establishment Clause is voluminous and much of it was considered and analyzed by the Supreme Court in the *Everson* case in which the court defined the general outlines of current Establishment Clause doctrine; in *Schempp* which defined the application of that clause in the school prayer context; and in other cases. See, for example, *McCollum v. Board of Education*, 333 U.S. 203 (1948). It is not the purpose of this brief to analyze the historical material which was considered by the Court in those cases. The purpose, rather, is to invite the attention of this Court to significant new research, and newly discovered historical material which has come to light since the *Schempp* case was decided in 1963, which demonstrates that the Court's current interpretation of the Establishment Clause is based upon a misunderstanding of the history ar purpose of that clause.

Professor Mark deWolfe Howe, in The Garden and the Wilderness, writes:

> Where have my speculations taken me? They began with the insolent suggestion that the Supreme Court has gone astray in its interpretations of American history. They moved on to the assertion that among the most important purposes of the First Amendment was the advancement of the interests of religion. The de facto establishment so familiar in American life and American institutions was born of that evangelical purpose. Had the Supreme Court

> been willing to recognize that the eighteenth-century's theory of inalienable rights and its philosophy of federalism combined to make the evangelical elements in the first Amendment innocuous—innocuous even to Jeffersonians—the justices would not have been tempted to give a wholly Jeffersonian reading to the religious clauses of the First Amendment. Among the factors which led them to disregard—event to distort—the intellectual background of the First Amendment was the unfortunate conviction of the Court that the policies of freedom and equality enunciated in 1868 in the Fourteenth Amendment must be read back into the prohibitions of the First Amendment—the familiar process of incorporation carried out, as it were, in reverse. The consequence may be admirable law, but it is, I submit, distorted history. Howe, The Garden and the Wilderness (1965), 31.

In his book, Joseph Story and the American Constitution, Professor James McClellan analyzes much previously neglected historical material relating to the First Amendment, including the important sermon delivered by Reverend Jasper Adams, a cousin of John Quincy Adams, in 1833, to a convention of the Episcopal Church in South Carolina [The sermon was later published under the title, "The Relation of Christianity to Civil Government in the United States," Charleston, February 13, 1833, before the Convention of the Protestant Episcopal Church of the Diocese of South Carolina (Charleston, 1833); see McClellan, Joseph Story and the American Constitution (1971), 136, n. 79]. The sermon, writes Dr. McClellan, "deals with this very issue of the absolutist versus the no preference theories at both the state and federal levels and, in anticipation of the establishment cases delivered by the Supreme Court since 1947, offers an abundance of evidence to refute the notion that church-state relations in the Revolutionary period and in early nineteenth-century America ever followed the absolutist example offered by Jefferson and Madison." McClellan at 136.

The First Amendment, in its treatment of religion, according to Reverend Adams, "leaves the entire subject in the same situation in which it found it; and such was precisely the most suitable course. The people of the United States . . . have emphatically declared that Congress shall make no change in the religion of the country. This was too delicate and too important a subject to be entrusted to their guardianship. It is the duty of the Congress, then, to permit the Christian religion to remain in the same state in which it was, at the time when the Constitution was adopted. They have no commission to destroy or injure the religion of the country. Their laws ought to be consistent with its principles and usages. They may not rightfully enact any measure or sanction any practice calculated to diminish its moral influence, or to impair the respect in which it is held among the people." In conclusion, state Adams, it should be noted, that "From the first settlement of this country up to the present time, particular days have been set apart by public authority, to acknowledge the favour, to implore the blessing, or to deprecate the wrath of Almighty God. In our Conventions and Legislative Assemblies, daily Christian worship has been customarily observed. All business proceedings in our Legislative halls and Courts of Justice, have been suspended by the universal consent on Sunday. Christian ministers have customarily been employed to perform stated religious services in the Army and Navy of the United States. In administering oaths, the Bible, the standard of Christian truth is used, to give additional weight and solemnity to the transaction. A respectful observance of Sunday, which is peculiarily a Christian institution, is required by the laws of all the states. My conclusion, then is sustained by the documents which gave rise to our colonial settlements, by the records of our colonial history, by our Constitutions of government made during and since the Revolution, by the laws of the respective states, and finally by the uniform practice which has existed under them." See McClellan at 138-30.

Chief Justice John Marshall wrote to Adams, expressing a favorable reaction to Adams' exposition of his thesis that the First Amendment conferred no authority on the Government of the United States to interfere with such state practices. "The documents annexed to the sermon certainly go far in sustaining the proposition which it is your purpose to establish," wrote Marshall, and he continued:

> The American population is entirely Christian, & with us Christianity & Religion are identified. It would be strange indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it. Legislation on the subject is admitted to require great delicacy because freedom of conscience & respect for our religion both claim our most sincere regard. You have allowed their full influence to both. Letter of John Marshall to Jasper Adams, May 9, 1833, quoted in McClellan at 139.

The Jasper Adams sermon is significant because of the historical evidence he marshaled in support of his conclusion and because of the written comments on that sermon by Justice Marshall and Joseph Story, both of whom were favorable to it, and James Madison, who regarded it unfavorably. Yet the Adams sermon has not been discussed in any of the Establishment Clause opinions of the Supreme Court.

Dr. McClellan summarizes his conclusion as to the historical analysis which currently prevails in Supreme Court opinions:

> To comprehend the original understanding of separation of church and state, at least a perusal of the acts of the First Congress which debated and drafted the First Amendment, would seem in order; but the Vinson and Warren and Burger courts have made no such effort. As a result, state religious practices in the late eighteenth and early nineteenth centuries, as well as the intent of the framers and supporters of the Bill of Rights, have been almost entirely ig-

> nored. The Court has, in fact, confined its inquiry into the historical background of the establishment clause to religious persecutions in Europe and the Virginia struggle against the Anglican establishment; and it has interpreted the Virginia experience (through carefully selected statements of Madison and Jefferson, against which conflicting statements or practices can be found), to be that of the Congress of 1791, and of the American republic generally. McClellan, Joseph Story and the American Constitution (1971) 142.

More recently, in another word, Dr. McClellan examined the operation of the various forms of established churches which existed in nine of the colonies at the outbreak of the Revolution, and concluded that:

> A principal underlying purpose of the First Amendment was to prevent the national government from usurping the powers of the states over the subject of church-state relations, and to reaffirm the authority or right of each state to define, without federal intereference, the nature of those relations within its own boundaries. The establishment clause, applying only to the federal government, was calculated to prevent not only the establishment of a national church, but to safeguard and leave undisturbed existing relations between church and state at the state and local level. McClellan, "The Making and Unmaking of the Establishment Clause", in "A Blueprint for Judicial Reform," McGuigan and Rader, eds. (1981), 295, 319.

The most recent and most detailed refutation of the Court's interpretation of the history of the First Amendment is "Separation of Church and State: Historical Fact and Current Fiction," by Prof. Robert L. Cord of Northeastern University. This book features a point-by-point refutation of the interpretation of the Establishment Clause made by the court in *Everson*, in *McCollum*, in other Supreme Court cases and especially in the influential writing of Leo Pfeffer. See, for example, Pfeffer, Church, State, and Freedom (rev. ed.) (Beacon Press, 1967)

"Inasmuch as historical arguments were the only justification offered by the High Court in *Everson* and *McCollum*," writes Professor Cord:

> . . . and given that American historical fact does not adequately support the Court's conclusions, the constitutional theories regarding Church and State resulting from the *Everson-McCollum* decisions rest on nothing more than what Justice Jackson honestly described as the Court's "own prepossessions." For me, this form of judicial decision making is incompatible with the rule of law. That grand concept relies on a more dispassionate form of judicial decision making, based on an absence of judicial predilections, especially in historical research, if history is invoked as dictating the Court's conclusions about the constitutionality of a political act.
>
> The tremendous damage that the erroneous history and decision of the *Everson-McCollum* Cases have wrought on the legitimate interaction between religion and community is clearly evident since their status as the precedent setting cases interpreting the Establishment Clause is constantly invoked by federal and state courts on all jurisdictional levels in cases dealing with the American constitutional doctrine of separation of Church and State. Cord, Separation of Church and State (1982), 144-45.

Professor Cord believes that "[i]n most instances, the Court's decisions involving separation of Church and State are not in accord with American historical fact" [Cord at 239] and he summarizes the intent of the religion clauses of the First Amendment as folows:

> From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the National Government. Third, it was so con-

structed in order to allow the States, unimpeded, to deal with establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite. Cord, at 15 (emphasis in original).

D. *An Incident from the First Congress.*

It is not the purpose of this amicus curiae brief to review in detail the historical background of the First Amendment. There is, however, one incident which is so revealing as to the intent of the framers of that amendment that it deserves mention.

The officially sanctioned prayer involved in this case simply permits persons engaged in a governmental activity to pray if they choose to do so. To interpret the First Amendment so as to preclude such permission would surprise the members of the First Congress who framed and approved that amendment. On September 24, 45, and 26, 1789, the Senate and House of Representatives did two things: they approved the First Amendment and sent it to the States for ratification and they called upon the President to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness." *Annals of Congress*, I, 949.

It cannot be believed that Congress requested the President to recommend a public day of prayer and, at the same time, proposed a constitutional amendment intended to prohibit that very type of prayer. See discussion in Rice, The Supreme Court and Public Prayer

(1964), 48-49. Indeed, Representative Thomas Tucker, of South Carolina, objected that, "it is a business with which Congress have nothing to do; it is a religious matter and, as such, is proscribed to us. If a day of thanksgiving must take place; let it be done by the authority of the several States; they know best what reason their constituents have to be pleased with the establishment of this Constitution." *Annals of Congress*, I, 950, Sept. 25, 1789. Congress, however, passed the resolution. If the question of Congress' competence in religious matters had not been raised, it could possibly be said that it had never occured to the members and therefore that the action of Congress ought not to be conclusive on the point. When, however, the issue was squarely joined, the First Congress deliberately overrode objections which were similar to those raised today against officially sanctioned, voluntary public school prayer, and voted to offer prayer to God.

Since the exercise of the reserved power to acknowledge and honor God is not forbidden to the States by any provision of the Constitution of the United States, officially sanctioned, voluntary public school prayer is not in violation of that constitution.

CONCLUSION

For the reasons stated above, amicus urges this Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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